

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 20<sup>th</sup> day of March, two thousand and thirteen.

PRESENT: JOHN M. WALKER, JR.,  
RICHARD C. WESLEY,  
CHRISTOPHER F. DRONEY,  
*Circuit Judges,*

UNITED STATES OF AMERICA,

*Appellee,*

v.

12-1954

MANUEL CARRASCO,

*Defendant-Appellant.*

FOR APPELLANT: James F. Greenwald, Assistant Federal Public Defender, James P. Egan, Research & Writing Attorney, for Lisa A. Peebles, Federal Public Defender for the Northern District of New York, Syracuse, NY.

FOR APPELLEE: Carl G. Eurenus, Assistant United States Attorney, Elizabeth S. Riker, Assistant United States Attorney, for Richard S. Hartunian, United States Attorney for the Northern District of New York, Syracuse, NY.

1           Appeal from the United States District Court for the  
2 Northern District of New York (Suddaby, J.).  
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4           **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED**  
5 **AND DECREED** that the judgment of the United States District  
6 Court for the Northern District of New York is **AFFIRMED**.

7           Defendant-Appellant Manuel Carrasco-Mateo ("Carrasco")  
8 appeals from a judgment by the United States District Court  
9 for the Northern District of New York (Suddaby, J.),  
10 sentencing him to 56 months' imprisonment for illegal re-  
11 entry. We assume the parties' familiarity with the  
12 underlying facts, the procedural history, and the issues  
13 presented for review.

14           We apply a "'deferential abuse-of-discretion standard'"  
15 in reviewing sentences for procedural and substantive  
16 unreasonableness. See *United States v. Pope*, 554 F.3d 240,  
17 244 (2d Cir. 2009) (quoting *Gall v. United States*, 552 U.S.  
18 38, 52 (2007)). We will find procedural error when, *inter*  
19 *alia*, a district court "rests its sentence on a clearly  
20 erroneous finding of fact" or "fails adequately to explain  
21 its chosen sentence" - particularly if the court departs  
22 from the Guidelines range. *United States v. Cavera*, 550  
23 F.3d 180, 190 (2d Cir. 2008) (*en banc*). We will set aside a

1 district court's sentence for substantive unreasonableness  
2 "only in exceptional cases where the trial court's decision  
3 'cannot be located within the range of permissible  
4 decisions.'" *Id.* at 189 (quoting *United States v. Rigas*,  
5 490 F.3d 208, 238 (2d Cir. 2007)).

6 Here, we find that the district court did not abuse its  
7 discretion in imposing a sentence toward the top end of the  
8 Guidelines range of 46-57 months. Carrasco argues that the  
9 district court committed procedural error by relying on  
10 unproven elements of a pending state charge. "A sentencing  
11 court is not limited to considering only evidence of the  
12 convicted offense [and] may take into account other relevant  
13 conduct." *United States v. Juwa*, 508 F.3d 694, 700 (2d Cir.  
14 2007). We recognize, however, that "facts relevant to  
15 sentencing must be found by a preponderance of the  
16 evidence," and that "an indictment or a charge within an  
17 indictment, standing alone and without independent  
18 substantiation, cannot be the basis upon which a criminal  
19 punishment is imposed." *Id.* at 701. In imposing its  
20 sentence, the court supported its reasoning that Carrasco  
21 "ha[dn't] gotten the message" by referencing the pending  
22 action, specifically, "the fact that there's a conflict

1 where the police have to be called," and the "severity" of  
2 an "altercation . . . with a weapon."

3 Certain aspects of the conduct leading to the state  
4 arrest were undisputed. To the extent that the district  
5 court may have considered aspects of the pending charges  
6 that were not proven by a preponderance of the evidence, the  
7 court committed procedural error; however, any error was  
8 harmless. See Fed. R. Crim. P. 52(a); *United States v.*  
9 *Mason*, 692 F.3d 178, 184 (2d Cir. 2012). Carrasco's  
10 sentence fell within the expected range. The court could  
11 have considered Carrasco's evasion of police to be  
12 sufficiently serious, or even found the case completely  
13 typical, and still sentenced Carrasco to 56 months. See  
14 *Rita v. United States*, 551 U.S. 338, 356-57 (2007).

15 Carrasco also challenges his sentence on the grounds of  
16 substantive unreasonableness. Our review merely "provide[s]  
17 a backstop for those few cases [in which] . . . the sentence  
18 imposed was shockingly high, shockingly low, or otherwise  
19 unsupportable as a matter of law." *United States v. Rigas*,  
20 583 F.3d 108, 123 (2d Cir. 2009). While this Court has  
21 declined to adopt the doctrine that a within-Guidelines  
22 sentence is presumptively reasonable, "[w]e recognize that

1 in the overwhelming majority of cases, a Guidelines sentence  
2 will fall comfortably within the broad range of sentences  
3 that would be reasonable in the particular circumstances."

4 *United States v. Fernandez*, 443 F.3d 19, 27 (2d Cir. 2006).

5 In imposing Carrasco's within-Guidelines sentence, the  
6 district court cited its belief that Carrasco's conduct  
7 "show[ed] a complete disregard or lack of respect for the  
8 laws of this country." Taking the relevant history as a  
9 whole, it cannot be said that the district court abused its  
10 discretion because Carrasco repeatedly entered the country  
11 illegally, was previously convicted of drug-trafficking, and  
12 dangerously attempted to evade the police. We find that the  
13 district court's sentence was "located within the range of  
14 permissible decisions" and is thus substantively reasonable.

15 See *Cavera*, 550 F.3d at 189 (internal quotation marks  
16 omitted).

17 Lastly, the potential applicability of the "Fast-Track"  
18 downward departure program was not raised at the district  
19 court by either the Government, defense counsel, or the  
20 court and is therefore waived. To the extent that Carrasco  
21 raises an ineffective assistance of counsel claim, the  
22 record before us is insufficient to make a determination.  
23 We therefore decline to decide it on appeal.

1           For the foregoing reasons, the judgment of the district  
2 court is hereby **AFFIRMED**.

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4                           FOR THE COURT:  
5                           Catherine O'Hagan Wolfe, Clerk  
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